Office-Supreme Court, U.S.
FILED
AUG 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-6

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1981

FORD MOTOR COMPANY,
*Petitioner,*

vs.

COMMERCIAL UNION INSURANCE COMPANY,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Ford's petition fails to show any basis whatsoever for review by this Court of the Ninth Circuit's decision in this matter. The case does not involve any issue of Federal or Constitutional law. It simply involves a question of California law; and it is both ironic and the height of audacity that the party which chose to remove this case from the California court where it was filed now claims that the highest Court in this land should exercise its

[1]Parent, Subsidiary (except wholly-owned) and Affiliated Corporations of Commercial Union Insurance Company.

Parents

1. Commercial Union Assurance Company Limited (CUAC)

A publicly owned corporation incorporated under the Laws of the United Kingdom of Great Britain.

2. Commercial Union Corporation (CUC)

A Delaware holding company, 100% owned by CUAC.

power of supervision to review a matter solely involving state law.

Ford claims that the Court of Appeal erred in its construction of California law in holding that California Code

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3. Commercial Union Insurance Company (CUIC)
A Massachusetts insurance company, 100% owned by CUC.

Subsidiaries (except wholly-owned)

1. Hairdressers Agency, Inc.
A New York corporation, 68.18% owned by CUIC.
2. Echlin, Irvin & Crowell & Co.
A Texas corporation, 20% owned by CUIC.
3. Bishop Insurance Agency, Ltd.
A Hawaii corporation, 44% owned by CUIC.

Affiliates

(Sister corporations directly owned by CUC, the immediate parent of CUIC)

1. Commercial Union Leasing Corporation.
2. American Employers' Insurance Company.
3. Commercial Union Risk Management, Inc.
4. Beacon Advertising Corporation.
5. CU Homeland Insurance Company.
6. CU Special Risks, Inc.
7. The Employers' Fire Insurance Company.
8. The Northern Assurance Company of America.
9. Beacon Risk Management Service, Inc.
10. Egret Holding Corporation.
11. CU Commercial Lines, Inc.
12. CU Personal Lines, Inc.
13. Special Underwriting Group, Inc.
14. CU Automation Services, Inc.
15. Commercial Union Investment Management Corporation.

of Civil Procedure Section 877 applies only to settlements made in good faith. A plain reading of the statute, however, demonstrates that Section 877(b) must be read in conjunction with Section 877(a).[2] The two subsections are joined by the word "and"; and the Ninth Circuit correctly held that the California Legislature intended that a dismissed defendant obtain immunity from contribution or indemnification only where the dismissal was given pursuant to a good faith settlement. Where there has been no settlement which would entitle the non-settling defendant to a set-off in the claim against him, the dismissed defendant is not entitled to immunity. Where Section 877(a) cannot be applied because there has been no money paid, Section 877(b) should not be applied. Otherwise, the dismissed defendant obtains a windfall and the non-dismissed defendant bears the full burden of the loss which was the proper responsibility of both parties. The Ninth Circuit properly noted that the dismissal of Ford was made solely for tactical reasons. It was made solely to enable Meyers to secure a larger recovery against respondent's insured,

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[2]Code of Civil Procedure Section 877 states:

"Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before a verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort—

(a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater; *and*

(b) It shall discharge the tortfeasor to whom it has given from all liability for any contribution to any other tortfeasors." (emphasis added)

Haberfelde. Under these circumstances, the Ninth Circuit properly held that respondent was entitled to its day in court in order to seek partial indemnity for a loss which the evidence will show was caused in part by Ford Motor Company.

Under California law, the plaintiff could pick and choose the tortfeasor against whom he wished to proceed; and under California law each tortfeasor is jointly and severally liable for the plaintiff's damages. (*American Motorcycle Association v. Superior Court*, 20 Cal. 3d 578 (1978)) However, it is equally clear that under California law one tortfeasor has a right to seek equitable partial indemnification from another tortfeasor. (*American Motorcycle Association v. Superior Court, supra*) In *American Motorcycle*, the California Supreme Court adopted a rule "designed to stimulate responsibility throughout the merchandising chain." (20 Cal. 3d 578 at 596) It adopted a rule which requires both parties, the manufacturer and the dealer, to share the loss. In so ruling, the California Court found that "the basic objective of the contribution statute" was to further "an equitable distribution of loss among multiple tortfeasors." (20 Cal. 3d at 584) While the Court held in *American Motorcycle* that a good faith settlement by a settling defendant discharges that party from any claim for equitable indemnity, the Court did not hold that a dismissal without a settlement bars a claim for equitable indemnity. Indeed, that would frustrate the entire focus of the Court's decision—the equitable sharing of loss on a comparative fault basis.

Ford has claimed that the Ninth Circuit ignored findings of fact made by the trial judge. That is not true. The trial

court made no findings of fact. Rather it ruled as a matter of law that a settlement was not necessary for the dismissed defendant to obtain immunity from a subsequent action for partial indemnification. (C.R. 447:5-16) The Ninth Circuit disagreed with the lower court opinion and correctly held that under California law, a dismissal which is not given pursuant to a settlement but is furnished for tactical reasons to assist the plaintiff in prevailing in his action against a non-dismissed party should not bar a subsequent action for partial indemnification against a joint and concurrent tortfeasor. In our view, the Ninth Circuit was eminently correct since it is contrary to principles of fundamental fairness and justice for a party's rights to be deprived by the solely self-interested action of his adversary.

The Ninth Circuit did not err in construing California Code of Civil Procedure Section 877. Mr. Boccardo admitted that he had not entered into any settlement with Ford.[3] His decision to dismiss Ford was a tactical decision, which he made in the interest of *his client* in order to have a better chance of recovery against respondent's insured. Respondent does not question the right of plaintiff's coun-

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[3]Both Mr. Boccardo and his partner, Mr. Lull, testified that they did not consider this a settlement. (R.T. 26:6-8; 36:12-14) The trial court did not find that there was a settlement. Instead, as noted above, the District Court specifically rejected respondent's argument that a settlement was necessary before Code of Civil Procedure 877 could be applied (C.R. 447:5-16) The Ninth Circuit properly held that the District Court was in error; and that the California Legislature only intended to grant immunity from a claim for equitable indemnity where there has been a settlement in good faith and not merely a dismissal in good faith.

sel to dismiss a defendant for whatever reasons counsel may have; but Mr. Boccardo's decision—made in the interests of his own client—should not be determinative of the rights of his adversary. All that respondent asks for and the Ninth Circuit held was that respondent has the right to litigate whether Ford Motor Company was negligent and whether it manufactured and designed a defective vehicle which contributed to the injuries sustained by John Meyers. Under *American Motorcycle Association v. Superior Court, supra,* it is clear that if Mr. Boccardo had not sued Ford, Haberfelde would have a right to seek partial indemnification from Ford on a comparative fault basis. Indeed, this is the very holding of *American Motorcycle,* since the Court in that case held that the American Motorcycle Association was entitled to file a cross-complaint for partial indemnity against the plaintiff's parents. If Ford's position were correct, a plaintiff could subvert the decision of the California Supreme Court by the artifice of naming a defendant in the complaint and then dismissing the complaint without the requirement of a good faith settlement.

If Ford's position were upheld, it would mean that an alleged wrongdoer has no right of redress from another alleged wrongdoer. It would mean that the plaintiff has sole control as to who does and who does not pay for a loss, notwithstanding the circumstances of the loss or the fact that the plaintiff really has no legitimate interest in the apportionment of responsibility between tortfeasors, particularly where, as here, the plaintiff has maximized his recovery at the expense of one party without any contribution from the other party which might be credited to the

remaining defendant under Code of Civil Procedure Section 877(a). If Ford had obtained its dismissal as part of a "good faith settlement", it would not be liable for comparative indemnity. In such a situation, however, the claim against Haberfelde would have been reduced by the amount of the consideration paid by Ford. That did not occur in the instant case. Ford paid nothing to the plaintiff and Haberfelde received no credit. The California Legislature in enacting Code of Civil Procedure Section 877.6 confirmed the Ninth Circuit's conclusion that a settlement must be made in good faith before a joint tortfeasor is prevented from seeking indemnification.[4]

The Ninth Circuit's interpretation of California law was correct. The Court properly followed and applied the principles enunciated in the California cases; and it correctly interpreted the statute in question. A holding that would permit a plaintiff to dismiss a defendant (without a true settlement) and thereby deprive another defendant from

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[4]The Legislative Counsel's Digest to Chapter 562 of California Statutes 1980 states:

> "Existing law provides, relative to a case involving alleged multiple tortfeasors, that a tortfeasor who has entered into a good faith settlement with a plaintiff must also be discharged from any claim for partial or comparative indemnity that may be pressed by a concurrent tortfeasor, but does not specify whether such discharge must occur before or after trial as to the plaintiff and the remaining joint tortfeasors."

This supports our argument that the Legislature intended that the discharge from claims for partial or comparative indemnity only apply to tortfeasors who have entered into a good faith *settlement*. Indeed, Code of Civil Procedure Section 877.6 (c) by its own terms only applies where there has been a "settlement . . . made in good faith".

its rights to obtain equitable sharing of the loss would amount to a complete frustration and subversion of the principles enunciated by the California Supreme Court in *American Motorcycle Association v. Superior Court.* The decision of the District Court was unsound, inequitable and erroneous; and the Ninth Circuit properly reversed the judgment of the District Court.

## CONCLUSION

For the reasons set forth above, respondent respectfully prays that the petition for writ of certiorari should be denied.

Dated, August 18, 1981
San Francisco, California.

Respectfully submitted,

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